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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. ~~1192~~ 157

AMERICAN EXPORT LINES, INC.,

Petitioner,

—against—

HOWARD ALI AMMAR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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On Brief in Opposition

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Circuit Court of Appeals is printed in petitioner's appendix and is officially reported in 326 F. 2d 955.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition served on June 4, 1964, except that initial jurisdiction was under and by virtue of the Jones Act (46 U. S. C. 688).

Questions Presented

1. As to the first question presented by petitioner on page 2 of its brief, does not the opinion below by Hays, *C.J.*, follow this Court's prior holdings that employer negligence, even the slightest in Jones Act cases, prompts shipowner liability, to exclude the application of causation analysis to limit liability for remote damages?

Apart from the opinion of the Court below, does not the general Trial Court's Charge to the jury on proximate cause and negligence actually include the surplus ingredient of strict foreseeability in the jury's consideration of damages flowing from the causally related motorcycle accident?

2. Where the comparative negligence doctrine was applied to the second accident by the Trial Court's Charge, placing on respondent a much greater legal duty to avoid contributing negligently to the aggravation of his injuries, rather than the lesser duty of the respondent required under the doctrine of avoidable consequences, with petitioner already clothed as a tortfeasor by reason of its conceded sole negligence for the first accident, can petitioner be heard to complain?

Respondent agrees with the Courts below that the measure of comparative negligence should be applied to the second accident but only in relation to the degree of respondent's contributory negligence under the avoidable consequences doctrine. Inasmuch as petitioner did not plead a defense of avoidable consequences, nor offered any request to charge on that specific defense, is it not precluded by Rule 51, F.R.C.P. to raise this issue on appeal; and should not the jury's 12th and 13th answers to special interrogatories that diminished respondent's recovery by

59.64 per cent contributory negligence be stricken and respondent be awarded full damages, which the Trial Court found was not excessive? (181a et seq.).

3. As to the third question presented by petitioner on page 2 of its brief: is it not a non-sequitur to accept the jury's finding of proximate cause between petitioner's negligence and the motorcycle accident, and then label the latter an intervening cause sufficient to break the causal chain?

From this is drawn the following:

a. Where the jury found petitioner's negligence a proximate cause, and this must be related solely to the symptom of "blackout" caused by organic brain damage, as charged (141a), could the riding of the motorcycle be ascribed to an intervening cause or contributory negligence?

b. Where respondent was assured by the U. S. Public Health Service doctors, and by the medical examiner for petitioner, that he did not suffer from blackouts caused by organic brain damage, prompted in major part by petitioner's failure to submit the all important ship's hospital findings that included a bloody spinal tap, to any subsequent examiner, can petitioner benefit by its continuing negligence and contend that respondent, without a blackout symptom for two months prior to the motorcycle accident, with a background of competence in riding motorcycles hundreds of times without an accident, should not have done what was natural and reasonable for him to do under the circumstances involved?

Numbers in parentheses with suffix "a" refer to defendant-appellants' appendix to its brief to the Court of Appeals below; without the suffix "a", to plaintiff-appellee's appendix below.

c. Where petitioner did not request a charge under the avoidable consequence doctrine, can it now contend that respondent failed to take a different choice than the one prompted by its wrong?

Statement

Respondent, a merchant seaman, 27 years of age on November 29th, 1959, in the capacity of reefer oiler, was caused to fall from a makeshift platform, not part of the original design of the S.S. Independence, in the course of his work while reading temperature gauges. He was precipitated to the concrete deck below, striking his head and back, and rendered unconscious. Petitioner's failure in multiple respects to furnish its seaman-employee a reasonably safe place to work on this confined, slippery and poorly illuminated platform, without any safety devices to protect and save his person, need not be recounted here. Petitioner does not contest the jury's findings on this accident by the answer to the second interrogatory that petitioner was negligent, and by the answer to the sixth interrogatory that respondent was free of any contributory negligence (151a, 152a).

After being rescued, respondent was taken by attendants to the ship's hospital where he remained as a patient for the remainder of the voyage, from the Azores, complaining of his head, back and numbness of his entire left side (31a). Prior to his service aboard this vessel he had been in good condition, without head or back complaints (17a, 19a, 20a). On December 5, 1959, when the vessel docked in New York, respondent was taken to the U. S. Public Health Service Hospital by ambulance (32a, 49). The records of the latter hospital did not include the ship's hospital record. All that was noted were respon-

dent's advices that he had increased pressure while aboard ship (65). A medical expert on behalf of the petitioner admitted that this oral advice was a "meaningless" phrase (65).

The ship's hospital record discloses that for the crucial six days following the accident the findings included "blurring of entire left disc margin . . . vomited three times last night, continued with severe headaches, backaches . . . persistent papilledema left . . . about five c.c.'s of blood contaminated spinal fluid removed, under increased pressure" (52), with other notations of nausea, dizziness, pounding sensation in head requiring use of icecaps, with blood pressure variation from 108 82 down to 86 56 (58). The personal injury report, also retained by the petitioner and kept from succeeding treating and examining physicians, noted a bloody spinal tap (70). The ship's physician was not called to testify and deny the truth of these objective findings, nor did petitioner's counsel explain his absence.

Without the ship's medical record as a guide, the United States Public Health Service Hospital concluded that the respondent had "possible conversion reaction in an hysterical personality" (63a). Respondent's medical expert testified that the initial hospitalization was most important (71a), and that the report thereof was not to be found in the hospital records, particularly the note of a bloody spinal tap which is highly significant to show laceration or bleeding inside the brain (72a). Petitioner's Dr. Echlin agreed that the initial ship's findings "are most important to be determined and then recorded" (57) and that prior to July 20, 1961 he encouraged the respondent as to his condition, which he diagnosed before the motorcycle accident to be a "mild cerebral concussion" (54), and that good practice required the ship's hospital

records be transferred with the patient, the failure of which could result in a mis-diagnosis (55, 60). Another medical expert called by petitioner conceded that the ship's notation of vomitation on three occasions was "of interest," that the doctor who could best testify about the meaning of the spinal tap taken aboard the vessel would be the ship's doctor himself (65), and on the diagnosis of hysteria there would not have been a blackout "where there is any realistic possibility of being injured" (64).

Following extensive in-patient and out-patient treatment at the U. S. Public Health Service Hospital, in August, 1960, respondent returned to sea (32a, 33a). He suffered recurrent blackout episodes, ending sometime in May, 1961 (37a), experienced mostly when he would jump out of bed quickly or rise suddenly (37a, 38a).

On July 20th, 1961, about two months after having last experienced any symptom described as a blackout, some friends came to his home with motorcycles (38a). He operated one that the parties stipulated would be described by the owner as being in good condition, and with the owner's consent (41a, 42a). Respondent had operated motorcycles many times before, without ever experiencing an accident (38a).

The motorcycle had been parked on a wet, grassy area, and after being choked and put in first gear, the front tire came upon the asphalt road and skidded (39a). Respondent recalled taking the motorcycle out of the skid, and then "I think I had one of those lousy blackouts again. . . . It must have been because I don't remember anything except opening my eyes and I saw this house right in front of me and I had no time to do anything" (40a). He experienced about the same feeling when he came out of

this blackout just before striking the house across the street as when he recovered from prior blackouts (40a). After the crash he "felt nothing" (41a), consistent with a later diagnosis of "transection of the spinal cord of C-5 level . . ." (42a), and thereafter while hospitalized suffered from the same blackouts he had experienced before the motorcycle incident (43a).

John Karaban, an eyewitness to the occurrence and who heard respondent's spontaneous remarks immediately thereafter, first observed the owner of the motorcycle choke it for respondent (17). It then started in the direction of the bay, went into a skid, then came out of the skid facing the house across the street, about 70 to 75 feet away (18, 19). The skid had started on the grass shoulder in front of respondents' house (19). After successfully coming out of the skid, the motorcycle then proceeded upright and straight into the house across the street (18, 19). Respondent's head was back, the motorcycle did not deviate from its direct course, and on the basis of his experience the witness testified that a loosened grasp of the handlebars, as when the operator might lose his senses, would not affect the power of the motorcycle to keep going (19, 20). He further described the incident on cross-examination as follows:

> "No. He started up and it skidded around, and then it straightened up and went on and hit the house" (20, 21).

Karaban ran over to the respondent who told him he had no feelings in his legs "and that he didn't remember traveling on the grass to the house after the skid. The first thing he remembered after that was the house in front of him" (18).

This is corroborated by the owner of the house struck by the motorcycle, Mary O'Keefe, who came upon the conscious respondent and heard him spontaneously state "that all of a sudden he saw the house in front of him". (22). This witness also testified about the number of lights that sufficiently illuminated her premises (22, 23).

Respondent's wife, Gloria Dawn Ammar, married to him for seven years, testified that before his service aboard petitioner's vessel respondent did not suffer any periods of unconsciousness, whereas he did thereafter (23-25). To support her and their three minor children he was compelled to return to sea on August 19, 1960 (25, 67a), and that though she had performed nursing care for him at home subsequent to the motorcycle incident, she could not continue to do so because of the children's needs and her own physical condition (25, 26).

Respondent was born on June 1, 1932, less than 28 years of age in November, 1959 (20a), with an average remaining life expectancy of 43.08 years from the date of his shipboard accident, and 39.36 years remaining from the date of trial (39). He had previously served in his highest rating as a junior engineer (16a). He had been declared physically fit to serve aboard the S.S. Independence by a company doctor (17a), and records of the petitioner showed that his earnings aboard petitioner's vessel were approximately $6,000.00 a year (155a). His work performance had been well regarded (36).

ARGUMENT

Petitioner seeks to upset a unanimous jury verdict based on special interrogatories in favor of a young Jones Act seaman, who became a totally and permanently disabled quadriplegic by reason of petitioner's negligence. After recording the jury's affirmative response to the question "Was the defendant's negligence a proximate cause of the accident which occurred on July 20, 1961" (152a, 163a), i.e., the motorcycle accident of July 20, 1961, by reason of a blackout causally related to the prior accident of November 29, 1959, the trial Judge, the initial panel of the Court of Appeals, and the Court of Appeals *en banc*, unanimously refused to disturb the verdict.

On an aborted Statement of Facts, and on local, antiquated common-law decisions rendered before more recent mandates from this Court, grounded in different policy and purpose, petitioner continues to disregard the principle that a jury verdict for respondent compels acceptance of his factual contentions, even if supported by the slightest evidence, in the light of progressive and humanitarian principles enunciated by this Court in favor of Jones Act seaman.

We have set forth the Questions Presented from respondent's viewpoint, as well as a concise Statement of facts to fill the gaps in petitioner's self-serving Statement. On the contention by respondent of plain error and that all issues incidental to the petition, and considered by the Court below, are subject to review by this Court (*U. S. v. Raines*, 362 U. S. 17, 27 at footnote 7, 80 S. Ct. 519, 526; *Walling v. General Industries Co.*, 330 U. S. 545, 67 S. Ct. 883; *Public Service Commission of Puerto Rico v. Havemeyer*, 296 U. S. 506, 56 S. Ct. 360; *Story Parchment Co. v.*

Paterson Parchment Paper Co., 282 U. S. 555, 51 S. Ct. 248; *Kessler* v. *Strecker*, 307 U. S. 22, 59 S. Ct. 694; 28 United States Code 1254), respondent requests that this Court summarily render the jury's answers to the special interrogatories consistent, so that the eleventh answer finding damages in the amount of $455,216.67 (153a) be undiminished by the erroneously permitted jury's finding of 59.64 per cent contributory negligence.

Should respondent's prayer for additional damages prompt this Court to consider a remand for re-trial on all issues, then as a practical matter related to pressing needs for himself and family, as well as the physical and mental hardships that are entailed in a re-trial, the totally paralyzed respondent would withdraw his alternate contentions and pray this Court to deny the petition.

POINT I

The advanced and humanitarian principles of maritime law under the Jones Act, embracing the related F.E.L.A., were properly and fully charged herein on negligence, foreseeability and proximate cause.

This Court has held that the wrong is greater where liability of a shipowner is grounded in negligence rather than liability without fault for unseaworthiness, as "Those risks are avoidable by the owner to the extent that they may result from negligence" *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 94, 66 S. Ct. 872, 877. Though the opinion of the Court of Appeals below agrees with petitioner that the Charge withdrew from the jury the question of remoteness of damages with respect to the negligence claimed, nonetheless a reading of the entire Charge clearly shows that the definitions of negligence, to include foreseeability, and

proximate cause as "a natural and continuous sequence, unbroken by any efficient intervening cause", were applied to both the shipboard and motorcycle accidents.

This is found in the Charge, as follows:

> "Under the Jones Act, it is not necessary that defendant's negligence to (sic) the sole proximate cause of that injury. It is sufficient if defendant's negligence played any part, even the slightest, in producing the injury" (139a),

and "negligence" was previously defined generally as follows:

> "It is the failure to exercise reasonable care, that is, the care which a reasonably prudent person would exercise under the circumstances, in the management of his property or person, *provided that it is reasonably foreseeable* that the failure to exercise such care would result in injury to someone in plaintiff's situation" (138a, emphasis added),

which was clearly applied to the instructions on the motorcycle incident, as follows:

> "If you find that plaintiff did 'black out' on the motorcycle and that his 'blackout' was in fact caused by organic brain damage sustained by him by reason of his fall on November 29, 1959, then you may find that the unseaworthiness of the vessel *or the negligence of the defendant was a proximate cause* of the accident of July 20, 1961" (141a, 142a, emphasis added).

It is axiomatic that instructions must be construed as a whole, even if part taken alone may be deemed inadequate. *Hearst Corporation v. Cámara Press, Inc.*, 291 F. 2d 714.

It is also fundamental that the Jones Act (46 U. S. C. 688) is unaffected by "local views of common-law rules" and incorporates by reference the Federal Employers' Liability Act (45 U. S. C. Sec. 51 et seq.). *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 244, 63 S. Ct. 246, 250. This is coupled with the solicitude with which seamen are traditionally viewed, adopting the language of Justice Story that "They are emphatically the wards of the admiralty . . ." (p. 246 of 317 U. S.).

The policy and purpose of Supreme Court decisions affecting seamen are significantly applied to the instant case by *Pope & Talbot v. Hawn*, 346 U. S. 406, 408, 409, 74 S. Ct. 202, 204, 205, as follows:

> "The harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires. Petitioner presents no persuasive arguments that admiralty should now adopt a discredited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight".

The Supreme Court had long ago expressed the principle that where there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect and proximate to it. *Milwaukee Railway Co. v. Kellogg*, 94 U. S. 475, 24 L. Ed. 256. In *Oliveras v. P. S. Lines Co.*, 318 F. 2d 890, 893, the Court stated that a proper Jones Act Charge need only recite that liability flows from negli

gence which is the proximate cause in whole or in part of injuries thereby sustained.

Further, petitioner fails to understand and accept the policy and thrust of pertinent Supreme Court cases strongly favoring railroad workers and Jones Act seamen, particularly *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U. S. 108, 83 S. Ct. 659 (1963), wherein the following is stated:

> "It is widely held that for a defendant to be liable for consequential damages he need not foresee the particular consequences of his negligent acts; assuming the existence of a threshold tort against the person, then whatever damages flow from it are recoverable . . . (cases and authorities cited) . . . such a tortfeasor must compensate his victim for even the improbable or unexpectedly severe consequences of his wrongful act" (p. 667 of 83 S. Ct.).

From the foregoing it is apparent that under the circumstances of respondent's prior habit of riding a motorcycle, coupled with his innocent belief from petitioner's motivated assurances that he was well, his operation of the motorcycle was normal and expectable, without any evidence to show it was an efficient break in the chain of causation. Cf. *Bonici v. Standard Oil Co.*, 103 F. 2d 437. Riding motorcycles was natural and probable for him to do, a test resolved from the effect of the known habits of human beings with respect to foreseeability. Respondent did not fail to take self protective measures against the danger created by the petitioner, nor did he create a danger equivalent to the "last clear chance doctrine", to be the final and decisive cause of the harm. The proof is clear, and the Charge without exception so stated, that the cause of respondent's loss of control of the motorcycle had

to be found to be the blackout (141a, 142a), which was found by the jury to be proximately related to organic brain damage from the shipboard accident.

On the subject of subsequent accidents due to weakened physical condition caused by negligence, explained in Comment "a", to apply where a second accident increased the harm [illegible] produces different harm, Sec. 460, Restatement of Torts, is pertinent:

> "If the negligent actor is liable for an injury which impairs the physical condition of another's body, the actor is also liable for harm sustained in a subsequent accident which would not have occurred had the other's bodily efficiency not been impaired".

Attempts by the wrongdoer-petitioner to blame respondent for lack of knowledge in operation of the motorcycle, or an assumed risk with knowledge of a disability, are entirely unproven and without any relevance to this case. The innocent reliance by respondent on the assurances of well being from petitioner's examining physician and the mis-diagnosis of the U. S. Public Health Service, prompted by petitioner's negligent failure to furnish the ship's hospital record, does not relieve petitioner from liability if its mis-conduct in this respect, coupled with its initial negligence be an efficient cause, as found by the jury, by the fact that there might be another concurrent cause for which it is not legally responsible, such as the riding of the motorcycle.

POINT II

The doctrine of avoidable consequences rather than a common law bar for consequential injuries would apply to diminish damages had respondent failed to exercise due care, which is denied.

Petitioner contends belatedly that its request to Charge number 14 embodies the substance of the avoidable consequences doctrine. Apparently it does not. This erroneous all or nothing request related to negligence alone is set forth on page 11 of the petition as follows:

> "If you find that under the circumstances, the riding of the motorcycle was negligent, then you must find for defendant with respect to the damages flowing from the second accident."

Implied in petitioner's quotation from Harper and James, *Law of Torts*, (1956), Vol. 2, Sec. 22.10, set forth on page 11 of the petition, is that the plaintiff is not completely barred by any contributory negligence on the duty to mitigate damages under the rule of avoidable consequences.

Assuming arguendo, which is denied, that respondent's negligence played a role in the total picture of damages, even so the rule in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 77 S. Ct. 443, must be applied to this class of cases. The jury verdict there was reinstated on the basis of the jury's exclusive function, and that defendant's negligence need not be the "sole, efficient, producing cause of injury" (p. 506 of 352 U. S.), the slightest employer negligence being sufficient, a principle not to be varied by "differing conceptions of negligence applicable under

state and local laws for other purposes" (footnote 13, p. 507 of 352 U. S.).

During the same term of Court, in *Webb* v. *Illinois Central R. Co.*, 352 U. S. 512, 77 S. Ct. 451, specific reference to the issue of causation prompted application of the *Rogers* holding that though there be other causes, "including the employee's contributory negligence," the slightest employer negligence would be enough to impose liability (p. 516 of 352 U. S.).

In McCormick, Law of Damages (Hornbook Series), West Publishing Co., 1935, the principle held applicable was contributory negligence only for the initial harm, not applicable at all to avoid the happening of the subsequent event, being instead the doctrine of "avoidable consequences and under which a plaintiff, with an otherwise valid right of action, is denied recovery *for so much* of the losses as are shown to have resulted from failure on his part to use reasonable efforts to avoid or prevent them" (pp. 951, 952 of 234 F. 2d, emphasis added).

In Accord:

The Noah's Ark v. *Beatle & Fitton Corp.*, 292 F. 2d 437 (1961).

Pertinently stated in *McCormick*, *supra*, at page 141, is the following:

"... if plaintiff neither knows nor has reason to know of the need for taking steps to avert damages, his failure to take such steps will not prejudice him ... Again, the plaintiff's failure to act to guard against injury will not affect his recovery where such failure was due to assurances given him by the defendant himself".

A case cited by petitioner, *Ellerman Lines, Ltd.* v. *The President Harding*, 288 F. 2d 288, Friendly, C.J., presented an analogy of personal injury cases to a question involving collision of two vessels, and stated that the doctrine of avoidable consequences means that if the plaintiff takes action within the range of reason, the defendant is liable for further damages resulting therefrom, and if a wrong forces a choice, the tortfeasor cannot be heard to complain that one rather than the other is chosen, for "The standard of what reason requires of the injured party is lower than in other branches of the law" (p. 290 of 288 F. 2d).

Holding that proximity in point of time or space is no part of the definition of proximate cause, the Court in *Southern Pacific Co.* v. *Ralston*, 62 F. 2d 1026 (C. C. A. 10, 1933), also stated the following on intervening cause:

> "But the connection is not actually broken, if the intervening event is one which might, in the natural and ordinary course of things, be anticipated as not entirely improbable, and the defendant's negligence is an essential link in the chain of causation" (p. 1028 of 62 F. 2d).

It follows from the foregoing that despite respondent's possible concurrent partial contributory negligence while upon the motorcycle, concededly not sole or wilful misconduct, where the jury found petitioner's shipboard negligence the continuing and efficient cause of the consequential damages, at the very least the verdict and judgment as they now stand should remain undisturbed.

POINT III

Plain error in the charge that favored petitioner, as regards its heavier burden under the consequential damages doctrine, should be corrected on review by a summary striking of the jury's answers to interrogatories which reduced the verdict by 59.64 per cent.

Petitioner cannot seek a new trial because of an inadequacy of instructions as to the measure of consequential damages, for where not requested "The inadequacy of instructions as to the measure of damages are not grounds for reversal." *Western & Atlantic R.R.* v. *Hughes, Adx.*, 278 U. S. 496; *Louisville & National R.* v. *Holloway*, 246 U. S. 525.

Rule 51, F.R.C.P. has an important application to the proper administration and disposition of trials. It was so held in *Troupe* v. *Chicago, D. & G. Bay Transit Co.*, CCA 2, 234 F. 2d 253, where the majority opinion by Waterman, *C.J.* affirmed the great weight of authority against appellate consideration of error in the Charge, even "on a significant aspect of the case", when a party has failed to comply with Rule 51 (footnote 10, p. 260 of 234 F. 2d).

Petitioner's position with respect to consequential injuries is posed by one concededly a wrongdoer for the threshold tort. Causal relationship and liability should be determined by the deep-rooted and fundamental principle of justice afforded Jones Act seamen. Accordingly, respondent is deserving of the relief sought under this point heading, for gross damages, found by the trial Court not to be excessive.

In *Gallick* v. *B. & O. Railroad Co.*, *supra*, a similar issue of inconsistency was resolved as follows:

"But it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: 'Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way . . . before we are free to disregard the jury's special verdict and remand the case for a new trial" (p. 666 of 83 S. Ct.).

In Accord:

Atlantic & Gulf Stevedores, Inc. v. *Ellerman Lines, Ltd.*, et ano, 369 U. S. 355, 364, 82 S. Ct. 780, 786.

Gallick goes further to hold that though no similar incident had previously occurred, nor known to the railroad to have occurred, this would not be determinative, as the absence of reason for anticipating a mishap or injury would be "—a far too narrow a concept of foreseeable harm to negative negligence under the Federal Employers' Liability Act" (p. 667 of 83 S. Ct.). Many authorities are cited to support the pertinent proposition that once the threshold tort is established, a defendant is liable for consequential damages, caused by it even "in the slightest part", though the particular consequences are not foreseeable.

The jury found the threshold negligence to be a proximate cause of respondent's consequential injuries, and awarded damages in a specific amount of $455,216.67 as recited in answer to the eleventh special interrogatory. As the jury found causal connection between the threshold negligence and consequential injuries, all else thereafter is surplusage. Accordingly the jury's erroneous reduction by 50.64 per cent in its 12th and 13th Answers should be summarily stricken, as they are prompted by a wrong theory of law charged by the Trial Court and on petition

er's failure to reques proper instructions on consequential damages.

CONCLUSION

Respondent had adequately proven his causes of action for the threshold tort and that the consequential damages were proximately and foreseeably related thereto, in light of current law and authority favoring Jones Act seamen. With respect to petitioner's contentions, the Trial Court's Charge was unexceptional. If this Court agrees with the Trial Court that the comparative negligence doctrine is applicable to the second incident, either as a matter of ruling law in maritime cases, or because timely exception was not taken by either party when special questions were posed to the jury, then of course the verdict and judgment thereon as they stand should remain unaffected.

On the other hand, if this learned Court agrees with respondent's contention that the special verdict was inconsistent only as it improperly reduced the gross damages on the second incident for consequential injuries, then without ordering a new trial the inconsistency should be corrected by affirming the first eleven special answers. This would be in accordance with the humanitarian policy inherent in ruling Supreme Court decisions applicable to seamen as wards of the Court, coupled with petitioner's failure to request a charge under the "avoidable consequences" doctrine, now precluded by Rule 51, F.R.C.P., and that its heavier burden in this respect was not met in the record of the case.

To grant petitioner's request for a new trial would be in tragic disregard of the clearly proven causal relationship between the threshold tort and the consequential quadriplegia permanently imposed on a young seaman.

proximately caused by a "blackout" following organic brain damage, initially obscured by petitioner's continuing fault.

Wherefore, it is respectfully urged that damages of $455,216.67 found in the jury's eleventh special answer be substituted in lieu of the sum of $183,725.45 found in its fourteenth special answer, or as an alternative, that the present judgment remain undisturbed, without granting a new tri , and that the petition be denied in all respects.

Respectfully submitted,

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